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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC., PETITIONER,

vs.

DREW PEARSON, ROBERT S. ALLEN, AND VAN REES PRESS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 25, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1938.
—8172

United States Court of Appeals for the District of Columbia

a. District Court of the United States for the District of Columbia.

No. 55429

In Equity

THE WASHINGTONIAN PUBLISHING CO. INC., *Plaintiff*,

vs.

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., and VAN REES PRESS, INC., *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 Filed March 8, 1933

In the Supreme Court of the District of Columbia

Holding An Equity Court

No. 55429

THE WASHINGTONIAN PUBLISHING CO. INC., *Plaintiff*,

vs.

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., VAN REES PRESS, INC., *Defendants*.

Bill of Complaint

To the Supreme Court of the District of Columbia:

The bill of complaint herein complains of the defendants and respectfully alleges:

1. That the complainant is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has maintained a place of business at 1703 L

Street, N. W., in the City of Washington, District of Columbia, where it has been engaged in the publishing business, and in furtherance of such business has printed and sold to the public for profit a certain magazine known as "The Washingtonian", and has operated and is operating its business under the name and style of "The Washingtonian Publishing Co. Inc." and that it sues herein in its own behalf, as will be hereinafter set out and shown to the court.

2. The defendant, Drew Pearson, and the defendant, Robert S. Allen, are residents of the District of Columbia and are sued in their own right.

3. Upon information and belief, that the defendant, Liveright, Inc., at all the times hereinafter mentioned was and is a corporation existing under the laws of the State of New York, and had and has its principal office and place of business at 31 West 47th Street, in the Borough of Manhattan, City, County and State of New York, where at all the times hereinafter mentioned it has been and is now engaged for profit in the publication, sale and distribution to the public of books and other literary matter.

4. Upon information and belief, that the defendant, Van Rees Press, Inc., was, at all the times herein mentioned, and still is a corporation organized and existing under the laws of the State of New York, and has, and has had at all the times hereinafter mentioned, its principal place of business at 508 West 26th Street, Borough of Manhattan, City, County and State of New York, where it has been and is engaged in the business of printing books, pamphlets and other literary material for profit, and in furtherance of, and in carrying out, its said business, has from time to time printed certain literary matter for the defendant, Liveright, Inc. as publisher, as will more fully hereinafter appear.

5. That this action is brought and the jurisdiction of this Court is invoked under the Copyright statutes of the United States, being the Act of March 4, 1909, as amended by the Acts of August 24, 1912, March 2, 1913, March 28, 1914 and December 18, 1919 (hereinafter called the Copyright Act), for the unlawful acts and conduct of, and the infringement of the copyrights described herein and the violation of the rights of the complainant by, the defendants and each of them, as hereinafter set forth.

6. That from a time previous to the year 1931 and for some time thereafter, the contents of the said magazine "The Washingtonian", published by the complainant as aforesaid, consisted of original articles and literary works and compositions which had been purchased by the complainant from their respective authors and published monthly by the complainant in said periodical "The Washingtonian", of which the complainant was the proprietor and publisher and which had a paid circulation of upwards of ten thousand (10,000) copies per month during each month of the year 1931.

7. On information and belief, that prior to the month of December 1931, one Rixie Smith, under the nom de plume of Linthicum Hall, wrote, composed and created a new and original article of artistic literary value and merit entitled, "The Mills—of the Gods." A copy of said original article is hereto annexed marked Exhibit A and made a part of this complaint.

8. Complainant avers upon information and belief that the information and materials contained in the said article were selected and arranged with great care and labor, and embodied and written in the style, words and language of the said Rixie Smith, and that the said Smith was the original inventor and author of the written matter contained in said article.

9. That on or about the 15th day of November 1931, the said Rixie Smith, for a valuable consideration, did sell, convey and assign to the complainant the said article entitled "The Mills—of the Gods."

10. That the article so purchased, entitled "The Mills—of the Gods" was thereafter published in print in the month of December 1931, under the title "The Mills—of the Gods (under the name of Linthicum Hall as the author, which name was the pen name or pseudonym adopted and used by the said Rixie Smith), in and as a part of the number of the said "The Washingtonian" for December 1931, by the complainant.

11. That the said number of "The Washingtonian" for December 1931 was a volume of about forty printed pages and consisted of the said article entitled "The Mills—of the Gods", written by the said Rixie Smith (under the pseudonym or pen name of Linthicum

Hall) therein published as aforesaid, and other literary compositions.

12. That for the purpose of securing copyright in "The Washingtonian" for the month of December 1931, the complainant (as required by Section 19 of the Copyright Act) did cause to be printed on the title page of each and every copy of the said issue of "The Washingtonian" for the month of December 1931, published and offered for sale in the United States, a notice and claim of copyright (pursuant to Sections 9 and 19 respectively of the Copyright Act) as follows:

"Published monthly by Marion Banister for the Washingtonian Publishing Co. Publication office Eckington Place and Florida Avenue, N. E., Editorial offices 1703 L Street, N.W., Washington, D. C. Copyrighted 1931 by The Washingtonian Publishing Co."

13. That after publication of the said issue of "The Washingtonian" for December 1931, with the notice and claim of copyright as hereinbefore set forth, the complainant (pursuant to Section 12 of the Copyright Act), on or about the 21st day of February 1933, caused to be deposited in the Copyright Office at Washington, D. C. two complete copies of the best edition then published of the said issue of "The Washingtonian" for the month of December 1931, which said two copies so deposited were entered on the records of the Copyright Office by the Register of Copyrights as Class "B No. 181717", as more fully appears by the Certificate of Registration under the seal of the Copyright office, issued by the said Register of Copyrights (pursuant to Section 55 of the Copyright Act). A copy of said Certificate is hereto annexed marked Exhibit B and made a part of this complaint. The fee prescribed by Section 51 of the Copyright Act for the registration of the said two copies of the issue of "The Washingtonian" for December 1931, deposited as hereinbefore alleged, was paid by the complainant.

5 14. That the said issue of "The Washingtonian" for December 1931 was printed from plates made in the United States and from type set within the limits of the United States, and that the printing of the text, including illustrations and binding of the said issue of "The Washingtonian" for December 1931 were performed within the

limits of the United States, as required by Section 15 of the Copyright Act, and the complainant has done all acts and things and has fully complied with all of the requirements of law necessary to establish its rights under the Copyright Act to copyright in said issue of "The Washingtonian" for December 1931, including copyright in and to the said Article, "The Mills—of the Gods".

15. That by reason of the said premises the complainant acquired the sole liberty and exclusive right of printing, reprinting, publishing, copying, vending, dramatizing and translating, in whole and in part, the literary work and material printed and contained in the said issue of "The Washingtonian" for December 1931, including the said article entitled "The Mills—of the Gods" (Exhibit A) for a term of twenty-eight years from the 10th day of December 1931, the date of copyright as aforesaid.

16. That the said article, "The Mills—of the Gods", because of its literary and artistic merit and unique treatment and presentation, gained wide discussion, vogue and celebrity in the United States upon its publication in the said issue of "The Washingtonian" for December 1931.

17. Upon information and belief, that heretofore and prior to the first day of February 1933, the defendants, without the knowledge and consent of the complainant and in infringement of the copyright hereinbefore described, and in violation of the rights of the complainant in and to the said article "The Mills—of the Gods" (Exhibit A), and at divers times since said date, at the City of New York, in the State of New York, and at other places, the de-
6 fendants have edited, published, printed and sold to the public and for profit, a literary work in one volume, and which is now so done, under the title of "More Merry-Go-Round", purporting to be written by an anonymous author and intended to be sold and which is now being sold to the public as an original and copyrighted work. That in making, editing, publishing and selling to the public as aforesaid and for profit the said book entitled "More Merry-Go-Round", the defendants, and each of them, have caused to be printed, published and sold as a part of said book "More Merry-Go-Round" the aforesaid article "The Mills—of the Gods", which is copied verbatim ad literatim from said article, the property of the complainant as afore-

said, and appears in defendant's volume "More Merry-Go-Round" under the chapter title, "The Wizards of Reconstruction", as set out in a copy thereof marked Exhibit A and hereby made a part of this complaint. That in so publishing the complainant's said article, "The Mills—of the Gods", as a part of the book entitled "More Merry-Go-Round", under the chapter title "The Wizards of Reconstruction" as aforesaid, the defendants, and each of them, have pirated, plagiarized, appropriated, stolen, imitated, copied, recomposed and arranged the essence and substance of complainant's said article, including the entire theme, treatment, characters, characterizations, episodes and features arranged in the same order and sequence, and all of the ideas invented, devised, written, composed and created by the said Rixie Smith in the said article so copyrighted by the complainant as aforesaid.

18. Upon information and belief, that since on or about the 1st day of January 1932, the defendants, and each of them, have printed, published, sold, distributed and circulated, and have caused and still cause to be printed, published, sold, distributed and circulated to the public for profit, the said book, "More Merry-Go-Round", throughout the United States, and falsely and unlawfully hold out and represent to the public, in advertising and publicity and otherwise, that the said book "More Merry-Go-Round" is an original work in its entirety, when in truth and in fact, as the defendants and each of them well know, the said book

"More Merry-Go-Round", and in particular the said
7 chapter therein contained called "The Wizards of Reconstruction", unlawfully and illegally imitates, appropriates, plagiarizes, copies and reproduces the complete essence and substance of the complainant's article entitled "The Mills—of The Gods".

19. The plaintiff is informed and believes and therefore avers that the defendants, Drew Pearson and Robert S. Allen, did on or before the month of January 1932 and after the issue of the said publication or magazine for the month of December 1931, purloin and pirate the said article contained in said December issue of said publication or magazine entitled "The Mills—of The Gods" without the consent of plaintiff and without first having attempted to obtain such consent and did purposefully and with intent to

defraud the plaintiff appropriate the said article to their own use and benefit by using and including it in the preparation by them of a manuscript of the said book "More Merry-Go-Round" and did pursuant to said piratical intent engage the defendants, Liveright, Inc. and Van Rees Press, Inc. to edit, publish, sell and distribute said book containing the said article of the plaintiff as a part thereof against the provisions of said copyright law as aforesaid.

20. That complainant's said article entitled "The Mills—of the Gods" is duplicated both in theme and in form in the chapter entitled "The Wizards of Reconstruction" of said book entitled "More Merry-Go-Round" where it is used in toto and to which it has been transferred with careful exactitude, as will appear from an inspection of Exhibits A and C annexed to this complaint.

21. Upon information and belief, that one, Drew Pearson, prepared or assisted in preparing the alleged original anonymous manuscript of the said book "More Merry-Go-Round", and that prior to the appearance and publication of said book and prior to the 1st day of December 1931, the said Pearson was associated with the complainant in and about the preparation of the material to be contained and published in the said issue of complainant's said magazine "The Washingtonian" for the month of December 1931, and that as such associate, and in the course of his said association, the said Pearson had full access to the said article "The Mills—of the Gods", and knew that the
8 same was the copyrighted property of this complainant. That notwithstanding such knowledge, the said Pearson knowingly, fraudulently and maliciously did conspire with the defendants to pirate and appropriate as their own the said article "The Mills—of the Gods" and to publish and print the same as a part of said book "More Merry-Go-Round", in disregard and violation of the sole proprietary right of complainant in and to said article as hereinabove set out.

22. In consideration whereof and because the complainant cannot have adequate relief except in a Court of Equity and in this Court, the complainant prays that—

(1) There be issued out of and under the seal of this Honorable Court a writ of subpoena directing and ordering the defendants herein to appear and answer this bill of com-

plaint, but not under oath, the oath being hereby waived, and to abide by and perform such other orders and decrees as may be made herein.

(2) The said defendants and each of them, their servants, agents, attorneys, employees and confederates be forthwith restrained by injunction temporarily pending final decree in this action, and perpetually thereafter, from publishing, printing, editing, selling, distributing or circulating to the public for profit or otherwise, the said book "More Merry-Go-Round", or any other imitation, copy or reproduction of the complainant's said article "The Mills—of the Gods" or any material part thereof.

(3) The defendant be required to deliver to the United States Marshal all of the copies of said book "More Merry-Go-Round" now in their possession or under their control, or the possession and/or control of either of them, and that the said Marshal be instructed and commanded to destroy the same pursuant to the statutes made and provided in such case.

(4) That the defendants and each of them be decreed to render an accounting to all of the receipts and profits which have accrued or are to accrue to them or either of them by reason of the said premises, and to pay the same over
9 to the complainant together with such damages which the defendants have caused to the complainant by their said illegal and unlawful acts; or

(5) At the election of complainant, that the defendants and each of them be directed to pay to the complainant the sum of One Dollar ($1.00) per copy of each printed sheet of infringing material contained in the said book "More Merry-Go-Round", and to pay to the complainant the costs of this suit.

(6) That complainant may have such other and further relief in the premises as may be equitable and as the nature of the case may require.

THE WASHINGTONIAN PUBLISHING CO., INC.
By: MRS. BLAIR BANISTER
Vice President

ALAN B. DAVID
GIBBS L. BAKER
Attorneys for Complainant

DISTRICT OF COLUMBIA, *ss:*

Mrs. Blair Banister, being duly sworn, deposes and says that she is the Vice President of The Washingtonian
10 Publishing Co. Inc. the complainant in the within action.

That she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to her own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to these matters she believes it to be true.

That the reason why this verification is made by deponent and not by complainant is because the complainant is a corporation and deponent is one of its officers, to wit, its Vice-President.

MRS. BLAIR BANISTER

GIBBS L. BAKER
ALAN B. DAVID
Attorneys for plaintiff

Sworn to before me this 8th day of March, 1933.

FRANK E. CUNNINGHAM,
Clerk

By HARRY M. HULL,
Asst. Clerk

11 Filed April 25, 1933

Joint and Several Answer to Bill of Complaint

* * * * * * * * *

The defendants, Drew Pearson, Robert S. Allen, Liveright, Inc., and Van Rees Press, Inc., for their joint and several answer to the Bill of Complaint of the Plaintiff, the Washingtonian Publishing Company, Inc., or such parts thereof as they are advised it is material and necessary for them to answer, say:

1. That they have no knowledge of the facts set forth in Paragraph 1 of the Bill of Complaint and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

2. That they admit the allegations of Paragraph 2 of the Bill.

3. That they admit the allegations of Paragraph 3 of the Bill.

4. That they admit the allegations of Paragraph 4 of the Bill.

5. That they have no knowledge of the facts set forth in Paragraph 5 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

6. (a) That they have no knowledge of the facts set forth in Paragraph 6 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

(b) That for further answer to Paragraph 6 of the Bill, defendant Pearson states that in June, 1931, one Frederick G. Brownell discussed with him the possibility of raising funds for "The Washingtonian", a monthly magazine published by plaintiff, and asked him to interest himself in the project; that subsequently one Marion (Mrs. Blair) Banister, who was designated the editor of The Washingtonian, urged that he assist in refinancing the publication, which was at that time seriously embarrassed by the impending receivership of the Mayflower Hotels Corporation of America which, as owner of the majority of the capital stock of the Publishing Company, had subsidized the publication; that the said Banister and Brownell, together with defendant Pearson, concluded to experiment with the publication of one or two issues of the magazine under a new editorial policy, and the printers, who were the largest creditors of the company, agreed to participate; that two issues, namely, October and November, 1931, were published under the editorial direction of defendant Pearson, with the cooperation of the said Banister and Brownell; that defendant Pearson then sought to purchase the assets of the Publishing Company but his offer was refused by the receivers of the Mayflower Hotels Corporation of America and he thereupon severed his connection with The Washingtonian and has since that time had nothing whatsoever to do with it; that during his connection with the magazine, defendant Pearson received no compensation whatsoever, but instead paid out of his own funds for several literary and art contributions which he secured and which added greatly to the success of the issues; that the magazine itself had no funds with which to pay for contributions because,

under the arrangement by which the printers were continuing publication, it was necessary to transfer to the printers all receipts from advertising and sales of copies; that the October and November, 1931, issues of The Washingtonian carried a notice of copyright, but application for registration thereof was not made at that time, and, in fact, was never made during the life of the publication, all of which will more fully hereinafter appear.

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7. (a) That defendant Pearson admits the allegation of Paragraph 7 except as to the originality of the article "The Mills—of the Gods", and states that this article was jointly conceived by Rixie Smith and himself.

(b) That defendants, Allen, Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 7 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

8. That they have no knowledge of the facts alleged in Paragraph 8 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

9. That upon information and belief they deny the allegations of Paragraph 9 that the said Rixie Smith did, for a valuable consideration, sell, convey and assign the said article "The Mills—of the Gods", to plaintiff, and, in further answer thereto, state, upon information and belief, that the said Smith received no compensation whatsoever from The Washingtonian for the said article; that the only compensation which the said Smith received was a payment made by defendant Pearson to the said Smith on July 22, 1932, for the use of the article in the publication known as "More Merry-Go-Round".

10. (a) That the defendants Pearson and Allen admit the allegations of Paragraph 10 of the Bill, except as to the purchase of the said article, and state, upon information and belief, that the plaintiff never completed the purchase of the said article by any payment to the said Smith therefor.

(b) That the defendants Liveright and Van Rees Press, Inc., have no knowledge of the facts alleged in Paragraph 10 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

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(c) In further answer to Paragraph 10, the defendant Pearson states, upon information and belief, that the De-

cember, 1931, issue of The Washingtonian was published without authority in that The Washingtonian Publishing Company was owned and controlled by the Mayflower Hotels Corporation of America, which was then being operated by receivers appointed by this Court, which receivers had notified the said Marion Banister, in August, 1931, that they would advance no more money to the Publishing Company, as had theretofore been done by the Hotel Company, or be a party in any way to the publication of the magazine, but that as set forth in a petition submitted by the said receivers to this Court for leave to sell the capital stock of The Washingtonian Publishing Company, copy of which petition is attached hereto and prayed to be read as a part hereof as defendant's Exhibit I, "subsequently one issue of The Washingtonian was published with the knowledge of said receivers, but without any liability having been assumed by them therefor, and later, one or two other issues were published *without their knowledge or consent*"; that this Court, under date of April 4, 1932, ordered the sale of the stock of the said company, in accordance with the terms set forth in the said petition, and a copy of said order is attached hereto and prayed to be read as a part hereof as defendant's Exhibit II.

11. (a) That defendants Pearson and Allen admit the allegations of Paragraph 11 of the Bill.

(b) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 11 and, therefore, neither admit nor deny the same, but, if material, demand strict proof thereof.

12. (a) That defendants Pearson and Allen admit the allegations of Paragraph 12 of the Bill, except as to the claim of copyright, and state, upon information and belief, that, as apparent from plaintiff's Exhibit II, attached to the Bill of Complaint, no formal claim of copyright was filed until February 21, 1933, at which time copies of the December, 1931, issue were deposited in the copyright office.

(b) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 12 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

13. That they have no knowledge of the facts alleged in Paragraph 13 and neither admit nor deny the same but, if material, demand strict proof thereof and state that if the deposit of copies were made as alleged they were not deposited pursuant to the provisions of Section 12 of the Copyright Act, in that the said copies, as shown by Paragraph 13 of the Bill, were deposited more than 14 months after the printing of the notice of the copyright, whereas Section 12 of the Act requires that such copies shall be *promptly* deposited in the copyright office.

14. That they have no knowledge of the facts set forth in Paragraph 14 of the Bill, and therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

15. That they deny the allegations of Paragraph 15 that plaintiff acquired the exclusive rights to the said article, "The Mills—of the Gods", and for further answer thereto state that any rights which might have been available to the plaintiff by compliance with the provisions of the Copyright Act became subject to the intervening rights of defendant Liveright, which became the owner of a copyright upon certain parts of the material, which is alleged to be an infringement, by publication, with notice of copyright in August, 1932, of a book entitled "More Merry-Go-Round"; that two copies of said book, as alleged in the Bill of Complaint, were immediately deposited in the copyright
16 office, together with an application for registration; and that the certificate of registration was duly issued on August 26, as fully appears on the copy thereof which is attached hereto and prayed to be read as a part hereof as defendants' Exhibit III.

16. That they have no knowledge of the facts set forth in Paragraph 16 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

17. (a) That defendants Pearson and Allen admit the allegations of Paragraph 17, except as to the infringement complained of, and they deny that the use of certain material appearing in the article "The Mills—of the Gods", and published in the book called "More Merrry-Go-Round" under the title "The Wizards of Reconstruction" constituted an infringement, and they further deny that in so using the said material they pirated, plagiarized, appro-

priated, stole, imitated, copied, recomposed, and arranged the essence and substance of the said article.

(b) That, for further answer, defendant Pearson states that he had a perfect right to the full use of the said article; that by letter and check dated July 22, 1932, he purchased, and paid the said Rixie Smith for, the privilege of such use; that, furthermore, he verily believed that The Washingtonian Publishing Company had abandoned any intention which it may originally have entertained regarding compliance with the Copyright Act in order to obtain protection as to the contents of the December, 1931, issue of The Washingtonian, even as the said Banister had failed to complete registration of copyright as to the issues of August, September, October and November, 1931, as will hereinafter more fully appear; and that defendant Pearson is informed and believes, and therefore avers, that the said Rixie Smith not only received no payment for the said article, but also that he released to The Washingtonian Publishing Company no rights whatsoever to copyright or otherwise appropriate to its exclusive use the said article

17 in whole or in part, and that the said Smith claimed to have retained the rights to the said article; and that the said Marion Banister well knew that the company was without authority to publish the issue of December, 1931, which contained the said article, and was without funds to pay for the article or to pay the fee for securing registration of copyright; and that defendant Pearson knew that the said Marion Banister had not, for several months prior to the final issue in December, 1931, filed application for registration, sent bills to subscribers, or kept the cir ·l-lation list of the magazine up to date.

(c) That defendants Liveright and Van Rees Press deny the allegations of Paragraph 17, except as to the mere fact of publication and sale of the book entitled "More Merry-Go-Round", which fact they admit, and, in further answer, state that they have no knowledge of the publication of the article entitled "The Mills—of the Gods", but were and are informed, and believe, that defendant Liveright has full and exclusive right to the publication and use of all material appearing in the said book, including that under the chapter title "The Wizards of Reconstruction".

18. That they admit the allegation of Paragraph 18 that they cooperated in having printed, published, sold, distributed, and circulated to the public, for profit, the said book "More Merry-Go-Round" throughout the United States, but deny that they falsely and unlawfully represented that the said book was an original work in its entirety, and they further deny that the book unlawfully and illegally imitates, appropriates, plagiarizes, copies and reproduces the complete essence and substance of the article entitled "The Mills—of the Gods".

19. (a) That defendants Pearson and Allen deny the allegation of Paragraph 19 that they purloined and pirated the said article, "The Mills—of the Gods", and engaged the defendants Liveright and Van Rees Press to publish
18 and sell the book "More Merry-Go-Round" in violation of the provisions of the Copyright Act, and in further answer thereto, aver, upon information and belief, that it was not necessary to secure the consent of plaintiff to use the said article or any part thereof, because of the fact that the plaintiff had never secured exclusive right to the use of said article, but on the contrary had never completed the purchase thereof from the said Rixie Smith and had, in fact, never completed registration of the copyright by filing a claim therefor and depositing in the copyright office the required copies of the December, 1931, issue, but had abandoned the publication with the issue of December, 1931, and that the publication and sale of the book "More Merry-Go-Round" were in complete accordance with the Copyright Act and all other laws.

(b) That defendants Liveright and Van Rees Press are informed and believe that it is not necessary for them to answer the allegations of Paragraph 19.

20. That they deny the allegation of Paragraph 20 that the article, "The Mills—of the Gods", is duplicated in the chapter entitled "The Wizards of Reconstruction" in the book "More Merry-Go-Round", but admit that the said chapter contains certain excerpts from the said article.

21. (a) That defendant Pearson denies the allegations of Paragraph 21 that he was associated with plaintiff in the preparation of the December, 1931, issue of The Washingtonian, and. in further answer thereto, states that he was

not associated with the plaintiff in the publication of The Washingtonian for the month of December, 1931, but that he severed his connection with the enterprise after the issue of November, 1931, as more particularly set forth herein in the answer to Paragraph 6 of the Bill; that he denies that the plaintiff secured the protection of the Copyright Act in connection with the said article "The Mills—of the Gods",
and denies that the plaintiff possessed any proprie-
19 tary right in and to the said article, and denies that
he conspired with the other defendants, or anyone, in any way, shape, or form; and, for further answer, states, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been secured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

(b) The defendant Allen admits the allegation of Paragraph 21 that defendant Pearson prepared or assisted in preparing the manuscript of the book "More Merry-Go-Round", but has no knowledge of the facts alleged as to defendant Pearson's association with the plaintiff and, therefore, neither admits nor denies the same but, if material, demands strict proof thereof; that defendant Allen denies the allegation that he engaged in a conspiracy to violate any right of plaintiff to the article "The Mills—of the Gods", and, for further answer, states, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been secured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

(c) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged as to the actual preparation of the manuscript of the book "More Merry-Go-Round", and as to defendant Pearson's association with plaintiff and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof; that they deny the allegation that they engaged in a conspiracy to violate any right of plaintiff to the article "The Mills—of the Gods", and, for further answer, state, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been se-

cured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

22. (a) That, in further answer to the Bill of
20 Complaint, the defendants, upon information and belief, aver that it is the practice of the copyright office to rely upon persons desiring the protection of the Copyright Act voluntarily to take the formal steps prescribed by the Act, including the prompt deposit of copies after publication of notice of copyright, and the filing of the application for registration, which application is often called the claim of copyright; that the copyright office has no means of ascertaining the publications that carry notice of copyright, and is, therefore, not in a position to know of whom to make demand for the deposit of copies and the completion of the registration process; that the Register of Copyrights believes that there are many cases where publications carry notice of copyright but the owners, because of imminent or actual abandonment of the publication or for other reasons, never complete registration, and that the great majority of such cases never come to the attention of the Register; and that the Register has no authority to determine or consider the rights of adverse copyright claimants.

(b) That, upon information and belief, the defendants also aver that the plaintiff duly completed registration of copyright for the issues of January, 1928, through July, 1931, with the exception of February, 1928, which latter issue was never registered, although notice of copyright was published therein; and that the issues of August, September, October, November and December, 1931, being the last five issues of The Washingtonian, carried a notice of copyright, but no application or deposit of copies was made until February 21, 1933.

(c) That, upon information and belief, the defendants aver that Section 13 of the Copyright Act authorizes the Register of Copyrights to make a demand upon persons for the deposit of copies of a publication which carries a notice
of copyright, and further authorizes the imposition
21 of a penalty for failure to comply with such a demand, but that the Register of Copyrights has not, throughout the years, made a demand for the deposit of copies under Section 13 in more than a score of cases; and

that the penalty for failure to comply with such a demand has, so far as can be ascertained, been imposed in only one case.

(d) That, upon information and belief, the defendants aver that the said Marion Banister communicated with the said Rixie Smith during the latter part of August or the first part of September, 1932, and asked that he join in the filing of a bill of complaint similar to that herein, but that the said Smith refused to be a party to such a proceeding.

The defendants, having fully answered the Bill of Complaint, ask that the Bill be dismissed and that they be allowed to go hence with their costs, including reasonable attorneys' fees.

DREW PEARSON
ROBT. S. ALLEN

LIVERIGHT, INC.

By ARTHUR PELL
Treas

VAN REES PRESS, INC.

By ABRAHAM C. VAN REES,
Trea.

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants,

Receipt of a copy of the foregoing Answer acknowledged this 24th day of April, 1933.

GIBBS L. BAKER
ALAN B. DAVID
Attorneys for Plaintiff

22 No. 29011 Series D

STATE OF NEW YORK,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, DO HEREBY CERTIFY, That Sadye Katz whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the

time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

STATE OF NEW YORK
County of New York, ss:

I, Drew Pearson, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

DREW PEARSON

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

SADYE KATZ
Notary Public.

(Notarial Seal)

CITY OF WASHINGTON
District of Columbia, ss:

I, Robert S. Allen, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

ROBERT S. ALLEN

Subscribed and Sworn to before me, a Notary Public in and for the District of Columbia aforesaid, this 24th day of April, 1933.

ALFRED BENNETT
Notary Public.

(Notarial Seal)

STATE OF NEW YORK
County of New York, ss:

I, Arthur Pell, being first duly sworn, on oath depose and say that I am the Treasurer of Liveright, Inc., and that I am duly authorized to execute the foregoing answer on its behalf and to verify the same; that I have read the foregoing answer by me subscribed on behalf of Liveright, Inc., and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

23

ARTHUR PELL
Treas

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

RUTH PELL
Notary Public.

(Notarial Seal)

No. 80419 Series D

STATE OF NEW YORK,
County of New York, ss.:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Ruth Pell whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer

oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

STATE OF NEW YORK
County of New York, ss:

I, Abraham C. Van Rees, being first duly sworn, on oath depose and say that I am the Treasurer of Van Rees Press, Inc., and that I am duly authorized to execute the foregoing answer on its behalf and to verify the same; that I have read the foregoing answer by me subscribed on behalf of Van Rees Press, Inc., and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

ABRAHAM C. VAN REES

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

THOMAS C. LARKIN
Notary Public.

(Notarial Seal)

No. 80418 Series D

STATE OF NEW YORK,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Thomas C Larkin whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said

county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

24 *Memorandum*

Filed July 11, 1933

* * * * * * * * * *

The motion to strike will be granted as to paragraphs 6-B, 7-A and all of 9 and 22 of the Answer, and otherwise overruled.

Upon the main question, argued before me, I am of the opinion that prompt deposit of copies at the Library is not necessary to complete the copyright. However, the answer contains allegations seeking to raise questions as to whether there was abandonment or dedication to public use. These were not referred to in the argument. I am uncertain whether the questions are properly raised by the answer. Therefore, I think it better that the allegations be allowed to stand for disposition at the time of trial. The long delay in filing copies would seem to be evidence bearing on that question.

July 10, 1933.

JAMES M. PROCTOR
Justice.

25 *Memorandum*

Filed March 28, 1935

* * * * * * * * *

At the conclusion of the trial I announced that I was satisfied from the evidence that the plaintiff company acquired copyright upon publication of the article with notice of copyright in "The Washingtonian" in its issue of December 10, 1931. Upon announcing such conclusion I reserved for further consideration the question of plaintiff's right to the remedy sought.

The facts which are material to a consideration of the question are stated in chronological form, as follows:

On December 10, 1931 the plaintiff published the last issue of its monthly magazine, The Washingtonian, claiming copyright thereon by means of the usual printed notice. (The claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office.) On August 25, 1932 Liveright, Inc., one of the defendants, published a book entitled "More Merry-Go-Round", written by defendants Pearson and Allen and printed by defendants Van Rees Press, Inc. This book contained matter substantially similar to the contents of an article appearing in the said December, 1931, issue of The Washingtonian. Copyright was claimed by means of the usual printed notice; On August 26, 1932 defendant Liveright deposited two copies of the said book, "More Merry-Go-Round", together with claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration; on December 14, 1932 the last edition of "More Merry-Go-Round" was printed; on February 21, 1933, plaintiff deposited copies of the said December, 1931, issue of The Washingtonian, together with claim of copyright, in the Copyright Office, paid the fee, and secured a certificate of registration; (on the same day it likewise deposited copies, and obtained registration of claim of copyright, of the other eleven issues, January through November, of 1931); on March 8, 1933 plaintiff instituted this suit alleging infringement of the article appearing in its said issue of December, 1931.

It thus appears that the plaintiff failed to register
26 its claim of copyright and to deposit copies of the

work in question until more than 14 months after publication, approximately six months after the occurrence of the alleged infringing act, and more than two months after the printing of the last edition of the alleged infringing work.

So far as it is pertinent to this discussion, Section 12 of the Copyright Act of 1909, as amended, provides—

"That after copyright has been secured by publication of the work with the notice of copyright as provided in Section nine of this Act, there shall be promptly deposited in the Copyright Office or in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . to be acompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

In approaching the question it is necessary to have in mind that at common law an author had the exclusive privilege of first publishing his work or the right to prevent it from being published by others unless he should have first published it himself. He had a right to determine whether or not it should be published at all, and if published, when, where by whom and in what form. But this exclusive right was confined to the first publication. When once published, his work was dedicated to the public, and he had no exclusive right to multiply copies of it or to control the subsequent issues of copies by others. This common law right is known as "common law copyright", or "copyright before publication". It is the right which an author has in his manuscript and is a property right. It is so stated by Samuel D. Hirschl in his special lecture "Trademark and Copyright Protection in Business".

The rights and remedies of the copyright proprietor, here considered, are created by statute. By the statute certain rights are secured and certain remedies afforded to the copyright proprietor. The rights being created by statute are determined and measured by the provisions of the statute only; but the statute has a double aspect; it not only secures rights to the copyright proprietor but affords him certain remedies as well; and the remedies are only such as are prescribed by the statute.

Clearly the copyright is secured to an author upon the publication of the copyright work with notice of his claim of copyright, but the statute requires more of him before he can avail himself of the remedies given by the statute. Since the remedies are statutory only he is entitled to them only when he has met the requirements of the statute. By complying with the conditions of the statute the copyright proprietor is entitled to recover statutory damages upon proof of such facts only as are made necessary by the language of the statute. In securing his copyright by publication an author has fixed in law his property rights
27 in the copyright work, but he has not put himself in position to ask or enforce the payment of statutory damages by one who infringes the copyright work. If he wishes to avail himself of the remedies afforded by the statute he must go further and do that which is required by the statute, i. e., he shall promptly deposit in Copyright Office two copies of the copyright work; until he does so he has a naked property right in the copyright work. When he has complied with the statute by promptly depositing the copies in the Copyright Office he has put himself in position to secure the protection of the courts and to recover statutory damages if his copyright work be infringed. The statute confers the property rights in the copyright work upon publication with notice, but the enjoyment and protection of such rights through the remedial processes afforded by the statute are subject to the accomplishment of the conditions and formalities prescribed in the statute. It would seem that the jurisdiction of this court to enforce plaintiff's rights is conferred solely by plaintiff's full compliance with such conditions and formalities.

Sutherland in his work on STATUTORY CONSTRUCTION, Second Edition, Volume II at page 1140 is authority for the proposition that in statutory proceedings the statute must be substantially complied with; every act required which is jurisdictional or of the essence of the proceeding, or prescribed for the benefit of the party to be affected thereby, must be done; the requirement is mandatory. At page 1142 he makes the further observation that where a statute confers a new right, privilege or immunity the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is man-

datory. On the same page he says that this is the rule as to copyrights.

The principles of statutory construction as here applied resemble those which control the construction of enabling statutes. Such statutes impliedly prohibit any other than the statutory mode of doing the acts which they authorize. This is illustrated by numerous cases where statutory rights and remedies are given. It is said that where a statute, in granting a new power, prescribes how it shall be exercised, it can lawfully be exercised in no other way; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the procedure are mandatory as to the essence of the thing required to be done.

I conclude as matter of law that as a condition precedent to plaintiff's right to avail itself of the remedies afforded by the copyright law it was necessary for it to promptly deposit two copies of its publication in the Copyright Office. This it failed to do and only attempted to comply with the statute in that regard some months after the occurrence of the alleged act of infringement. The plaintiff has not therefore made out a case which will entitle it to the statutory remedy which it seeks. For the reasons assigned plaintiff's bill of complaint will be dismissed; the costs to be assessed against the plaintiff. Section 40 of the Copyright Act permits the award of attorneys' fees as part of the costs within the discretion of the Court; but the Court is not persuaded that attorneys' fees should be so assessed in this case.

Formal orders, necessary for the record, will be presented.

F. DICKINSON LETTS
Justice

28 *Memorandum*

Filed February 10, 1936

* * * * * * * * * *

Since writing the memorandum filed March 28, 1935 plaintiff's motion for re-hearing has been filed and submitted. Upon consideration of such motion my attention has been directed to the case of Lumiere vs Pathe Exchange, Inc.,

et al, 275 Fed. 428, and certain English cases notably Goubaud & Another vs. Wallace decided by the High Court of Judicature in May, 1877.

An examination of these authorities and others furnished by plaintiff in support of the motion for rehearing persuaded me that the conclusion expressed in my memorandum of March 28, 1935 is erroneous.

It follows that the motion for re-hearing should be granted. An appropriate order may be presented granting such motion.

F. DICKINSON LETTS
Justice

29 *Findings of Fact and Conclusions of Law*

Filed December 14, 1936

• • • • • • • • • •

The Court makes and finds the following facts and conclusions of law:

Findings of Fact

1. The plaintiff is a corporation created and existing under the laws of the State of Delaware with an office and place of business at Washington, D. C.

2. The defendants, Drew Pearson and Robert S. Allen, are residents of the District of Columbia; and the defendants Liveright, Inc., and Van Rees Press Inc., are corporations organized under the laws of the State of New York with principal offices in the city of New York.

3. In December, 1931, and for some time prior thereto, the plaintiff was the owner and publisher at Washington, D. C., of a monthly magazine of general circulation called THE WASHINGTONIAN.

4. On December 10, 1931, the plaintiff published an issue of THE WASHINGTONIAN claiming copyright upon the contents thereof by means of the usual printed notice. However, the claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office. The said December issue contained, among other material, a featured article entitled "The Mills—of
30 the Gods" written by one Rixie Smith under the pen name of Linthicum Hall.

5. The plaintiff has published no issue of THE WASHINGTONIAN since the said issue of December 10th, 1931.

6. On August 25, 1932, Liveright, Inc., one of the defendants, published and offered for general sale a book entitled "More Merry-Go-Round" written by defendants Pearson and Allen and printed by defendants Van Rees Press, Inc. This book included a chapter entitled "The Wizards of Reconstruction" which contained matter practically identical with the said article by Rixie Smith appearing in the said December, 1931, issue of THE WASHINGTONIAN.

7. Copyright of the book "More Merry-Go-Round" was claimed by means of the usual printed notice, and, on August 26, 1932, defendant Liveright deposited two copies of the said book, together with the claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration. On December 14, 1932, the last edition of "More Merry-Go-Round" was printed.

8. On February 21, 1933, plaintiff deposited copies of the said December, 1931, issue of THE WASHINGTONIAN together with claim of copyright, in the copyright Office, paid the fee, and secured a certificate of registration. On the same day plaintiff likewise deposited copies and obtained registrations of claim of copyright of the other eleven issues—January through November—of 1931.

9. On March 8, 1933, plaintiff instituted this suit alleging infringement of the article appearing in the said December, 1931, issue of THE WASHINGTONIAN.

31 *Conclusions of Law*

1. Upon the publication of the December, 1931, issue of THE WASHINGTONIAN, with the notice of copyright, the plaintiff acquired a valid copyright of the magazine and of all of the material contained therein, including the article entitled "The Mills—of the Gods", and the plaintiff has not lost or disposed of its right.

2. The failure of the plaintiff promptly to deposit two copies of the said December, 1931, issue of THE WASHINGTONIAN after publication, and to secure registration of the copyright thereof, did not deprive it of the right to maintain an action for infringement of the material contained therein, even though such infringement occurred prior to the deposit of copies.

3. The deposit by plaintiff of copies of its December, 1931, issue of THE WASHINGTONIAN on February 21, 1933, and thereupon obtaining registration certificate thereof, entitled plaintiff to maintain an action for infringement occurring before the deposit of copies and registration of the work.

4. The plaintiff's copyright of the December, 1931, issue of THE WASHINGTONIAN was wrongly infringed by the defendants by the publication and sale of the book entitled "More Merry-Go-Round", and plaintiff is entitled to damages against the defendants for such infringement and to a perpetual injunction against further infringement.

December 14th 1936

F. DICKINSON LETTS
Justice.

32 *Decree*

Filed December 14, 1936

* * * * * * * * *

This cause coming on to be heard at this term upon the pleadings and testimony, and being considered by the Court, it is, by the Court, this 14th day of December, 1936,

ADJUDGED, ORDERED and DECREED,

1. That the plaintiff is the owner of the copyright of the December, 1931, issue of the monthly magazine known as "The Washingtonian", and said copyright has been wrongfully infringed by the defendants by the publication and sale of the book entitled "More Merry-Go-Round" and the plaintiff is entitled to recover damages from the defendants, jointly and severally, for such infringement.

2. That the defendants, their agents, servants and employees be, and they are hereby, perpetually enjoined from infringing plaintiff's said copyright and from hereafter publishing or selling or otherwise distributing any part of the copyrighted article entitled "The Mills—of the Gods", contained in said December, 1931, issue of "The Washingtonian";

3. That this cause be, and hereby is, referred to the Auditor of this Court who shall take, state and report as follows:

(a) What damages have been suffered by the
33 plaintiff due to the infringement of the plaintiff's copyright as hereinbefore set out, as well as all the profits which the defendants, or any one of them, shall have made from such infringement, and in proving such profits, the plaintiff shall be required to prove sales only and the defendants shall be required to prove every element of cost which they claim;

(b) The number of copies of the infringed book entitled "More Merry-Go-Round" made or sold by or found in the possession of the defendants or their agents or employees.

F. DICKINSON LETTS
Justice.

From the foregoing decree the defendants, by their attorney, in open court, note an appeal to the U. S. Court of Appeals for the District of Columbia. A bond to cover costs is hereby fixed in the sum of One Hundred Dollars ($100) with leave to deposit with the clerk the sum of Fifty Dollars ($50) in lieu thereof. Upon the perfection of an appeal and the filing of a supersedeas bond in the sum of Five Thousand Dollars ($5,000) the reference to the Auditor as provided in the decree shall be stayed pending the final determination of the case upon review.

F. DICKINSON LETTS
Justice.

Memorandum

DECEMBER 23, 1936

$50 deposited on appeal by E. C. Lovett.

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34 *Assignment of Errors*

Filed January 5, 1937

* * * * * * * * *

The Court erred:

1. In concluding that the plaintiff has not lost its copyright to the article in question.

2. In concluding that the failure of the plaintiff promptly to deposit two copies of the December, 1931, issue of THE

WASHINGTONIAN after publication, and to secure registration of the copyright thereof, did not deprive it of the right to maintain an action for infringement of the material contained therein, even though such infringement occurred prior to the deposit of copies.

3. In concluding that plaintiff's deposit on February 21, 1933, of copies of the December, 1931, issue of THE WASHINGTONIAN, and thereupon obtaining registration certificate thereof entitled plaintiff to maintain an action for infringement occurring before the deposit of copies and registration of the work.

4. In concluding that the plaintiff is entitled to damages against the defendants.

5. In not dismissing the bill of complaint.

6. In other respects shown by the record.

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants.

Receipt of a copy of the foregoing Assignment of Errors acknowledged this 31st day of December, 1936.

GIBBS L. BAKER
ASHBY WILLIAMS
Attorneys for Plaintiff.

35 *Joint Designation of Record*

Filed January 9, 1937

* * * * * * * * *

It is hereby stipulated and agreed by the attorneys for the respective parties that the transcript of record which the Clerk of the Court is hereby requested to prepare in the above entitled cause for submission to the Court of Appeals shall consist of the following:

1. Bill of Complaint, but omitting the Exhibits attached thereto.

2. Joint and several answer of the defendants to bill of complaint, but omitting the Exhibits attached thereto.

3. Memorandum opinion (July 10, 1933) of Mr. Justice Proctor that plaintiff's motion to strike certain paragraphs of the answer should be granted.

4. Memorandum opinion (March 28, 1935) of Mr. Justice Letts that the bill of complaint should be dismissed, with

costs against the plaintiff, but with no assessment of attorneys' fees.

5. Memorandum opinion (February 10, 1936) of Mr. Justice Letts that his previous opinion was erroneous and that plaintiff's motion for a rehearing should be granted.
6. Decree in favor of plaintiff.
7. Findings of Fact and Conclusions of Law.
8. Assignment of Errors.
9. This designation.

GIBBS L. BAKER
ASHBY WILLIAMS
Attorneys for Plaintiff

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants.

36 District Court of the United States for the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 35, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 55429 in Equity, wherein The Washingtonian Publishing Co. Inc., is Plaintiff and Drew Pearson, Robert S. Allen, Liveright, Inc., and Van Rees Press, Inc., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of February, 1937.

C. E. STEWART,
Clerk.

(Seal)

Endorsed on Cover: No. 6921. Drew Pearson et al., Appellants, vs. The Washington Publishing Co., Inc. United States Court of Appeals for the District of Columbia Filed Mar 6—1937 Moncure Burke, Clerk

[fol. 33] Monday, December 13th, A. D. 1937.

No. 6921

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., et al., Appellants,

vs.

THE WASHINGTONIAN PUBLISHING CO., INC.

The argument in the above entitled cause was commenced by Mr. Eliot C. Lovett, attorney for appellants, and was continued by Mr. Horace S. Whitman, attorney for appellee, and was concluded by Mr. Eliot C. Lovett, attorney for appellants.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6921

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., et al., Appellants,

v.

THE WASHINGTONIAN PUBLISHING CO., INC.

Appeal from the District Court of the United States for the District of Columbia

Decided April 25, 1938

Elisha Hanson and Eliot C. Lovett, both of Washington, D. C., for appellants.

Gibbs L. Baker and Horace S. Whitman, both of Washington, D. C., for appellee.

Before Groner, Stephens and Miller, J.J.

MILLER, J.:

This is an appeal from a decree of the District Court of the United States for the District of Columbia holding that a copyright owned by appellee was wrongfully infringed

by appellants and that appellee is entitled to damages for such infringement.

The Washingtonian Publishing Co., Inc., appellee, in December, 1931, published an issue of a monthly magazine of general circulation, called The Washingtonian, claiming copyright thereof by means of the usual notice printed therein as required by the Copyright Act of the United States then in force.[1] However, copies of that issue of the magazine were not deposited in the Copyright Office until February 21, 1933—at which time two copies were deposited and a certificate of registration was obtained. Publication of the magazine The Washingtonian was discontinued after the December 1931 issue.

In August, 1932, appellant Liveright, Inc., published and offered for general sale a book entitled "More Merry-Go-Round" written by appellants Fearson and Allen and printed by appellant Van Rees Press, Inc., one chapter of which included material which is conceded to be practically identical with an article which was included in the December 1931 issue of The Washingtonian. Copyright of the book "More Merry-Go-Round" was claimed by the usual printed notice therein, and on August 26, 1932, copies thereof were deposited in the Copyright Office and a certificate [fol. 35] of registration secured. In June, 1933, Liveright, Inc., was adjudged a bankrupt and is not concerned in this appeal.

Chronologically summarized, this means that appellee published and claimed a copyright in December, 1931; appellants published, deposited copies and claimed copyright on the same material eight months later, in August, 1932; appellee deposited copies in February, 1933, fourteen months after its own publication and six months after appellants' publication.

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[1] Section 9, Copyright Act of 1909, 35 Stat. 1077, 17 U. S. C. A. § 9. "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 21 of this title."

Appellee regards appellants' publication as an infringement. Appellants concede that appellee obtained a copyright,[2] but insist that its right to recover in the present case is barred because it failed, promptly, to deposit copies of its magazine as required by Section 12 of the Copyright Act, 35 Stat. 1078, as amended (17 U. S. C. A. § 12);[3] and because in the meantime appellants had acquired superior intervening rights in the literary matter in dispute.

Appellee, in its brief, says:

> The charge here is that the appellants pirated, plagiarized, and stole the property of the appellee and the claim of intervening rights is equivalent to a confessed thief seeking to establish a right of property in the stolen goods.

On the other hand, appellants say in their brief:

> Under such a construction a publisher of a daily newspaper could include a copyright notice in each issue of his paper but decide that, instead of depositing copies and paying the two-dollar registration fee, all of which would exceed $700 per year, he would merely wait and see if any financially responsible party pirated

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[2] See National Cloak & Suit Co. v. Kaufman, C. C. M. D. Pa., 189 F. 215; New York Times Co. v. Star Co., C. C. S. D. N. Y., 195 F. 110; Davenport Quigley Expedition v. Century Productions, S. D. N. Y., 18 F. Supp. 974; Lumiere v. Pathé Exchange, 2 Cir., 275 F. 428.

[3] Section 12, so far as material, reads as follows: "After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be *promptly deposited* in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published * * * to be accompanied in each case by a claim of copyright. *No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.*" [Italics supplied.]

> [sic] material contained in any one of the issues and, if so, he would proceed to deposit copies of the issue in question, register his claim, and then institute proceedings, * * * Surely, no court would countenance a proceeding under such circumstances. * * *

And appellee concedes in its brief that no effort was made to deposit copies, as required by the Act, until after counsel were employed to bring suit, thus giving color at least to appellants' innuendo that appellee deliberately waited to see if a financially responsible party would fall into the trap.

We do not wish to be understood, from anything we may say herein, as approving or condoning such practices. [fol. 36] Whatever the ethics of the situation may be, and in spite of considerations which may call for professional and public condemnation, the questions which have been presented for our determination in the present case are solely ones of law.

Copyright property under the Federal law is wholly statutory. Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346. It is not unusual for statutes to require strict compliance with designated provisions as conditions precedent to the bringing of actions for the enforcement of rights.[4] In this

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[4] Thus, it has been held that: No action may be maintained under the Workman's Compensation statutes unless a claim has been timely filed. Rogulj v. Alaska Gastineau Mining Co., 9 Cir., 288 F. 549; Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78. See Fulton v. Hoage, 77 F. (2d) 110, 64 App. D. C. 232.

A holder of a note may not seek recovery from an indorser without first making a timely presentment and notification of dishonor. Roberts v. International Bank, 25 F. (2d) 214, 58 App. D. C. 87. See Magruder v. Union Bank of Georgetown, 3 Pet. [U. S.] 87.

Residence for the statutory period is a prerequisite to an action for divorce. Winston v. Winston, 271 F. 551, 50 App. D. C. 321; Rollings v. Rollings, 53 F. (2d) 917, 60 App. D. C. 305.

A condition precedent to a shareholder's representative suit under Federal Equity Rule 27 is appeal to the officers

case the Statute provides (Section 12) that no action shall be maintained for infringement until the provisions of this title with respect to the deposit of copies shall have been complied with. It is argued that this merely postpones "the enforcement of the remedy" and that no matter how long may be the delay in compliance, so soon as compliance takes place the remedy becomes available. The penalty prescribed by Section 13 of the Act, 35 Stat. 1078 (17 U. S. C. A. § 13)[5] is referred to by appellee as indicating the only purpose of the requirement for prompt deposit of copies. Some support for this argument can be found by giving to the word until [6] one of its common meanings; by reading it with-

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of the corporation or its stockholders. Watts v. Vanderbilt, 2 Cir., 45 F. (2d) 968.

One of the essentials of the cause of action on an insurance policy is the filing with the insurer of proofs of loss. Harris v. North British & Mercantile Ins. Co., 5 Cir., 30 F. (2d) 94, cert. denied, 279 U. S. 852; Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398. The acquisition of title by adverse user is an example of intervening rights and dispossession of an owner whose only fault is his failure timely to assert his rights. 2 Tiffany, Real Property (2d ed. 1920) 1920.

[5] "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

[6] "* * * up to the time of, implying cessation or reversal at that time; * * *" Webster. "The word 'until' is a word of limitation, and presupposes that, when the condition following such word shall become operative, the pre-

out careful consideration of the rest of the language of Section 12; and by disregarding the major purposes of the Act. But when the word until is considered in its context, not only [fol. 37] in the Section but in the light of the whole Act, as it should be, an entirely different result is reached, and a different meaning is properly ascribed to it.[7]

It must be conceded that appellee could not maintain an action for infringement at the time of publication of "More Merry-Go-Round" or for six months thereafter. Fourteen months having elapsed since publication and claim of copyright, and six months having elapsed since the alleged infringement, appellee undertakes to comply with the Statute and thus to remove the restriction which impedes action. What must it do? Section 12 provides that it must promptly deposit two copies. It does not say merely to deposit, but that the deposit must be promptly made; and promptness must be measured from the date of publication. Unless it can be said, therefore, that a delay of fourteen months is promptness, appellee has failed to comply with the Act.

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cedent condition or status shall fall." Bud Hoard Co. v. F. Berg & Co., 137 Okla. 16, 17, 278 P. 273, 274. "Its office is to point out some point of time or the happening of some event when what precedes it shall cease to exist or have any further force or effect." Maginn v. Lancaster, 100 Mo. App. 116, 130, 73 S. W. 368, 372.

[7] It has been held that where an insurance policy failed to provide a definite time within which to file a proof of loss, such proof must be filed within a reasonable time in order to come within the provision that no action could be maintained until all conditions had been performed. Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 822. Cf. Barbour v. St. Paul Fire & Marine Ins. Co., 101 Wash. 46, 171 P. 1030.

In Chelmsford Co. v. Demarest, 7 Gray [Mass.] 1, a case involving an action on a suretyship bond of a public official, which bond was for a term "until the appointment and qualification of his successor," it was held that the surety was not bound for an indefinite period after the incumbent's term expired, but only for a reasonable time. See, also, Camden v. Greenwald, 65 N. J. L. 458, 47 A. 458, and American Surety Co. v. Independent School Dist. No. 18, 8 Cir., 53 F. (2d) 178, cert. denied, 284 U. S. 683.

It is not contended that the deposit was made promptly in the present case; and there is no basis upon which such a contention could be made. Synonyms for the word prompt, as commonly used, are punctual, ready, expeditious and quick. Its antonyms are dilatory, procrastinating, slow and sluggish. To ascribe to the word a meaning which would describe appellee's action as prompt would be to give it a meaning exactly its opposite.[8]

The copyright laws must be given a reasonable construction and the various sections thereof must be read together with a view to effecting the purposes intended by Congress. Bobbs-Merrill Co. v. Straus, supra; Metro-Goldwyn-Mayer Distributing Corp. v. Bijou, 1 Cir., 59 F. (2d) 70, 76. The two major purposes of the Act are (1) to secure to the author, or his successors in interest, a monopoly,[9] more or less in the nature of a reward for his genius and industry (Harris v. Coca-Cola Co., 5 Cir., 73 F. (2d) 370, cert. denied, 294 U. S. 709), as well as for the encouragement of others, simi- [fol. 38] larly as in the case of patents;[10] (2) to give notice

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[8] See, also, Bacigalupi v. Phoenix Bldg. & Const. Co., 14 Cal. App. 632, 641, 112 P. 892, 895, reasonable time; Houston & T. C. Ry. v. Foster, [Tex.] 86 S. W. 44, ordinary diligence; Burlingame v. Adams Express Co., D. C. R. I., 171 F. 902, 904, without unreasonable delay; Western Union Tel. Co. v. Barbour, 206 Ala. 129, 89 So. 299, 17 A. L. R. 103, as quickly as practicable under the circumstances. See, also, Weil, American Copyright Law (1917) 313.

[9] Globe Newspaper Co. v. Walker, 210 U. S. 356, 367; Stern v. Rosey, 17 App. D. C. 562, 564.

[10] Bauer & Cie v. O'Donnell, 229 U. S. 1, 10; Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 511; H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 7: "Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors."

to the public that the author or other owner has not abandoned the child of his intellect, or dedicated it to public use.[11] We said in Koppel v. Downing, 11 App. D. C. 93, 104:

The law of copyright, while securing a long continued monopoly, contemplates, and the policy of it requires that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public.

Prompt deposit and registration aid in achieving both purposes. The reason therefor is well stated in Weil, American Copyright Law (1917) 310, as follows:

The object sought by compelling registration is that third persons, by inquiry, may ascertain whether, or, not, any proposed acts or works would violate any existing statutory copyright. The primary object of requiring the deposit of copies is that the subject matter of works in which copyright is claimed, may be made public and available, for purposes both of information and of avoiding infringement. The purely secondary object is the enrichment of the Library of Congress. The primary purpose would be entirely defeated unless the deposit were made "promptly." If the only necessary effect of failure to make the deposit, "promptly," were to prevent the institution of suit, until the deposit was made, the statute would become, as the former English one was justly called, a mere snare for the unwary, who were foolish enough to rely upon absence of registration as showing absence of copyright. [And see succeeding pages.]

An examination of the history of the copyright law brings us to the same conclusion. In its earlier forms the law required deposits to be made within definite periods of time—(1) deposit of title of the copyrighted material before publication and of a copy of the material itself within six months after publication (Act of 1790, 1 Stat. 125); (2) deposit of title before publication and of a copy within three months after publication (Act of 1831, 4 Stat. 437; and Act of 1846, 9 Stat. 106); (3) deposit of a printed copy within one month after publication (Act of 1865, 13 Stat. 540); (4) deposit

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[11] Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188 et seq.; Wheaton v. Peters, 8 Pet. [U. S.] 591, 661.

of title before publication, and of copies within ten days after publication (Act of 1870, 16 Stat. 213); and (5) deposit of title "on or before the day of publication" and deposit of copies "not later than the day of the publication * * * ." Act of 1891, 26 Stat. 1107. The Act of 1909, 35 Stat. 1077 (17 U. S. C. A. §9) substituted the requirement of prompt deposit for a specific time limit. It gave a copyright to anyone who published with claim of copy-
[fol. 39] right; but it split up the congeries of rights, powers, privileges and immunities which constituted the original concept of copyright and gave to the word a new meaning, limited at least to the extent that no action for its protection could be maintained until after compliance with the requirement of prompt deposit.

The reasons for promptness of deposit are present today in even greater measure than in earlier years. The liberalizing of the requirement should not be so construed as to defeat its purpose. Appellee's failure to comply with the Act in the present case, coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent.[12]

We are led to the same conclusion, also, by the time limits fixed by Section 13 of the Act, relating to forfeiture of copyrights, and by the language of the House Committee Report on the bill which became the Act of 1909.[13] Section 13 provides for forfeiture—as contrasted with mere loss of right to maintain action—in case of failure to deposit within three months after notice from the Register of Copyrights, or within six months in the case of a copyright proprietor in an outlying territorial possession of the United States.

Lumiere v. Pathé Exchange, 2 Cir., 275 F. 428, relied on by appellee, did not decide the question of the present case. The court in that case expressly avoided consideration of "Other important and difficult questions depending upon the construction of the Copyright Act * * *." And in his concurring opinion, Hough, J., said:

I agree with the foregoing opinion *as far as it goes.* There are, however, two points for which this decision will

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[12] See Weil, American Copyright Law (1917) 313.

[13] H. R. Rep. No. 2222, supra note 10, and language there quoted. See, also, p. 11 of the Report.

by inference be thought authority and as to which I do not wish to be concluded. They are: (1) * * * and (2) whether in any form of action plaintiff can recover damages for infringements committed *before he* not only registered his claim of copyright, but *deposited the requisite number of copies.* [Italics supplied.]

Judge Hough's second reserved point is the one with which we are concerned.

In our opinion the purpose of the law was clearly not to give retroactive effect to a grossly tardy compliance and thus to establish ab initio appellee's right to maintain an action against one who in the interim had acted adversely to its interest.[14] Cf. Wheaton v. Peters, 8 Pet. [U. S.] [fol. 40] 591, 664; Ebeling & Reuss v. Raff, E. D. Pa., 28 U. S. P. Q. 366. See, also, Sutherland, Statutory Construction (2d ed. 1904) § 632. It is not necessary for us to decide what the rights may be, of one who makes such a tardy compliance, as against another who pirates the copyrighted material after the deposit of copies.

Reversed.

Stephens, J., concurs in the result.

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[14] The situation in the instant case is somewhat similar to that of a reissue of a patent. R. S. 4916 (35 U. S. C. A. § 64) provides that whenever a patent is wholly or partially inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention more than he had a right to claim as new, if the error arose by inadvertence, accident, or mistake, and without fraudulent intent, the issued patent may be surrendered and a new patent for the same invention, in correct form, be reissued to the patentee. Under such circumstances, the courts have held that a person who, between the date of the original issue and the date of an application for a reissue, makes or sells an article or uses a process which is broader than the original grant but is included in the application for reissue, acquires an intervening right a against the patentee. Ashland Fire Brick Co. v. General Refractories Co., 6 Cir., 27 F. (2d) 744, 746, cert. dismissed, 278 U. S. 662; Krauth v. Autographic Register Co., D. C. N. J., 285 F. 199, rev'd on other grounds, 3 Cir., 286 F. 470; Supreme Mfg. Corp. v. Security Mfg. Co., 9 Cir., 299 F. 65, cert. denied, 266 U. S. 614.

[fol. 41] Monday, April 25th, A. D. 1938.

April Term, 1938

No. 6921

Drew Pearson, Robert S. Allen, Liveright, Inc., et al., Appellants,

vs.

The Washingtonian Publishing Co., Inc.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed with costs, and that this cause be and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Miller.

April 25, 1938.

Mr. Justice Stephens concurs in the result.

[fol. 42] In the United States Court of Appeals for the District of Columbia

No. 6921

Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., Appellants,

vs.

The Washingtonian Publishing Co., Inc., Appellee

Designation of Record

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.

4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

Horace S. Whitman, Gibbs L. Baker, Attorneys for Appellee.

Service of copy admitted this 22nd day of July, 1938.
Elisha Hanson, Eliot C. Lovett, Attorneys for Appellants.

[fol.43] [Endorsed:] In the United States Court of Appeals for the District of Columbia. No. 6921. Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., Appellants, vs. The Washingtonian Publishing Company, Inc., Appellee. Designation of Record. United States Court of Appeals for the District of Columbia. Filed Jul. 22, 1938. Joseph W. Stewart, Clerk. Horace S. Whitman, Attorney at Law, 611 Bowen Building, 815 15th Street, N. W., Washington, D. C.

[fol. 44] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for the appellee in the case of Drew Pearson, Robert S. Allen, Liveright, Inc., et al., Appellants, vs. The Washingtonian Publishing Co., Inc., No. 6921, April Term, 1938. as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of July, A. D. 1938.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8172)